No. 15835.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNIER,

Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Appellee.

Petition to Review a Decision of the United States District Court.

APPELLANT'S OPENING BRIEF.

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vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Appellee,

Petition to Review a Decision of the United States District Court.

APPELLANT'S OPENING BRIEF.

Statement of the Case.

This is an appeal from an order made by the United States District Court dissolving a temporary restraining order and judgment of dismissal for lack of jurisdiction over the subject matter. [Tr. of Rec. p. 23.]

Appellant filed a complaint in the United States District Court, Southern District of California, Central Division, No. 1305-57-T, against The Board of Medical Examiners of the State of California, seeking declaratory relief and injunction to restrain the Board from suspending the appellant from the practice of medicine in the State of California for one year, and to declare the rights of the petitioner. [Tr. of Rec. pp. 3-17.]

That the Honorable Ernest A. Tolin, United States District Judge, issued an order to show cause and tem-

porary restraining order, restraining the Board from suspending the appellant pending the hearing of the order to show cause. [Tr. of Rec. pp. 17-18.]

That on motion of the appellee the District Court ordered the complaint dismissed for lack of jurisdiction. [Tr. of Rec. pp. 19-20; 22-23.]

On motion of the appellant the District Court restored and granted an injunction during the pendency of this appeal, enjoining and restraining the Board from enforcing the order suspending the appellant from practicing medicine and surgery in the State of California. [Tr. of Rec. pp. 20-21.]

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291. The pleading relied on is the Complaint. [Tr. of Rec. pp. 3-17.]

Statement of Facts.

Appellant, a practicing physician and surgeon for the past twenty years, licensed by the State of California [Tr. of Rec. p. 3], was convicted on a plea of *nolo contendere* in the United States District Court for the Southern District of California, Central Division, of two counts of violating Title 26, United States Code, Section 145(b), charging that he attempted to defeat and evade income taxes for the years 1947 and 1948. [Tr. of Rec. pp. 4-5.]

Federal Judge Leon Yankwich pronounced the judgment, and at the time of doing so stated:

> "This case is different from the usual one involving a physician. Many a time a physician involved in income tax difficulties is one who resorts to un-

ethical practices, and who then tries to cover them up by covering up his income tax. In this particular case there is no such thing. There is no income indicated from any improper sources. This is really the case of a person who has become involved because of his lack of experience in financial matters and his failure to surround himself with persons who, while he is carrying on his work, would watch his finances and see that proper report is made. This is a very voluminous file here which has been built up by the many letters sent in, which I have in front of me. Some are of a confidential nature and I will not have them filed, but will return them to the probation officer.

"I think the man's past life is not such that probation would be necessary. I think a substantial fine will serve the ends of justice in this particular case, and allow this man to go on: I think, on a plea of nolo contendere they do not consider—at least, the Medical Board does not consider that as a ground for revoking his license, and unless they have professional grounds, certainly his license should not be revoked for this particular offense. I am sure it would be revoked if I imposed any sentence other than a fine, although, technically speaking, a plea of nolo contendere does not carry with it any of the civil penalties." [Tr. of Rec. pp. 5-6.]

Thereafter The Board of Medical Examiners of the State of California on or about November 10, 1955, made an order directing that appellant be suspended for a period of one year from the practice of medicine and surgery in the State of California, which order was based on the convictions on the pleas of *nolo contendere* hereinabove referred to. [Tr. of Rec. pp. 3-4.]

That the order of suspension was made after the Board's Hearing Officer proposed that a suspension of one year be stayed, and appellant placed on probation for a period of three years. The recommendation of the Hearing Officer was overruled by the Board. [Tr. of Rec. p. 4.]

That at the time the offenses were alleged to have been committed, namely, income tax evasion for the years 1947 and 1948, Section 2383 of the California Business and Professions Code provided as follows:

> "Sec. 2383. Conviction of felony or offense involving moral turpitude: Evidence. The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct." [Tr. of Rec. p. 9.]

That said Section 2383 of the California Business and Professions Code was amended in 1951 to read as follows:

> "Sec. 2383. Conviction of felony or offense involving moral turpitude; record as evidence: What deemed conviction: Authority of Board after order under Pen. C. Sec. 1203.4. The conviction of a felony, or of an offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The Board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or

> when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code, allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty or dismissing the accusation, information or indictment." [Tr. of Rec. p. 8.]

That appellant entered his pleas of *nolo contendere* to said income tax charges after Section 2383 of the California Business and Professions Code was amended.

That the substantial changes in Section 2383 as enacted in 1951, insofar as they relate to the appellant, are:

That after the words, "the conviction of a felony" a comma was inserted, so that the statute, as amended in 1951, read:

> "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter * * *"

And there was added:

> "A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section * * *" [Tr. of Rec. p. 9.]

That the appellant exhausted all of his remedies available to him in the State Courts of California, and certiorari was denied by the United States Supreme Court when appellant sought to review the decision of the State Court dismissing appellant's petition for writ of mandate to set aside the decision of The Board of Medical Examiners. [Tr. of Rec. pp. 12-13.]

The Board of Medical Examiners has stipulated that it did not seek to discipline the appellant for the conviction of an offense involving moral turpitude. (Stip.)

Specification of Error.

The Court Erred in granting defendant's motion to dismiss complaint for lack of jurisdiction.

Questions Presented by Appellant.

I.

Does a conviction based on a plea of *nolo contendere* carry with it any civil penalties?

II.

Is a 1951 amendment allegedly making a conviction of a felony, without moral turpitude, a ground for disciplinary action against a physician and surgeon under Section 2383 of the California Business and Professions Code an *ex post facto* law where applied to an act committed prior to 1951?

III.

Has The State Board of Medical Examiners committed an intrusion into the processes of the Federal Court by attaching a penalty to a conviction based on a plea of *nolo contendere,* on which the Federal Court may act?

IV.

Is a conviction of a felony, not involving moral turpitude, based on a plea of *nolo contendere,* a ground for disciplinary action against a physican and surgeon under Section 2383 of the California Business and Professions Code?

V.

Was it an abuse of discretion to suspend the appellant for one year?

ARGUMENT.

I.

Does a Conviction Based on a Plea of Nolo Contendere Carry With It Any Civil Penalties?

In the case of *In re Hallinan,* 43 Cal. 2d 243, the Supreme Court of California said on page 250:

> "Since Section 145, Subdivision (b), is a United States Statute, we must accept the interpretation given it by the United States Courts."

The State Medical Board is relying on a plea of *nolo contendere* to a Federal statute in seeking to discipline Dr. Furnish. It therefore must depend on the Federal statute and Federal procedure.

A plea of *nolo contendere* is not open to the accused in all criminal prosecutions, and is allowable only under leave and acceptance by the Court. It is equivalent to a plea of guilty for the purposes of the case only, but is distinguishable in that it cannot be used against the defendant as an admission in any civil suit for the same act.

Tucker v. United States, 196 F. 2d 260 (C. C. A. 7th);

United States v. Standard Ultramarine and Color Co., 137 Fed. Supp. 167 (D. C. N. Y.).

A conviction based on a plea of *nolo contendere* cannot be used in any other case.

Mickler v. Fahs, 243 F. 2d 515 (C. C. A. 5th);

United States v. Lair, 195 Fed. 47 (C. C. A. 8th).

A plea of *nolo contendere* cannot be considered in disposing of issues in a civil action.

United States v. One Chevrolet, 91 Fed. Supp. 272.

It should be noted that the learned trial judge at the time of imposing sentence stated ". . . unless they have professional grounds, certainly his license should not be revoked for this particular offense . . . technically speaking a plea of *nolo contendere* does not carry with it any of the civil penalties." [Tr. of Rec. p. 6.]

II.

Is a 1951 Amendment Allegedly Making a Conviction of a Felony, Without Moral Turpitude, a Ground for Disciplinary Action Against a Physician and Surgeon Under Section 2383 of the California Business and Professions Code an Ex Post Facto Law Where Applied to an Act Committed Prior to 1951?

The 1951 Amendment allegedly making a conviction of a felony, without moral turpitude, ground for disciplinary action against a physician and surgeon under Section 2383 of the Business and Professions Code is an *ex post facto* law where applied to an act committed prior to 1951.

The offenses to which the plaintiff entered a plea of *nolo contendere* in the Federal Court involved income taxes for the years 1947 and 1948, with the returns for those years having been filed in 1948 and 1949.

At the time the tax returns were filed Section 2383 of the Business and Professions Code provided:

"The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct." It should be noted that there was no comma after the word "felony" in 1948 and 1949.

The comma was inserted after the word "felony" in Section 2383 of the Business and Professions Code in 1951.

Therefore the Board of Medical Examiners has applied to your appellant the law as enacted in 1951, rather than the law as it was in 1947-1949.

Article 1, Section 10, of the United States Constitution, provides that no state shall "pass any bill of attainder or *ex post facto law.*" The application of such an *ex post facto law* amounts to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

An *ex post facto law* within constitutional prohibition against the enactment of *ex post facto* laws, is one which makes a crime of an act which when committed was not a crime, or a law which increases the punishment for an act already committed. It has also been held that an *ex post facto law* is one which renders an act punishable in a manner in which it was not punishable when it was committed. It has been said the standard of determination in considering whether a given statute is *ex post facto* arises out of a comparison of the laws themselves and the rights which they confer or the obligations they impose.

Milliken v. McCauley, 25 Fed. Supp. 202, 93 F. 2d 645;

Fuller v. McCauley, 93 F. 2d 1004;

Hall v. People of the State of California, 79 F. 2d 132.

It has been said an ordinance is *ex post facto* if it imposes punishment for past conduct lawful at the time it was engaged in.

> *Garner v. Board of Public Works, City of Los Angeles,* 341 U. S. 716, 95 L. Ed. 1317.

An *ex post facto* law is one which renders a previously innocent action criminal, aggravates or increases the punishment, penalizes an innocent act while assuming to regulate civil rights and remedies, and deprives an accused of some protection or defense previously available, or alters his situation to his disadvantage.

> *United States v. Forino & Garfinkel,* 59 Fed. Supp. 846, 166 F. 2d 887.

III.

Has the State Board of Medical Examiners Committed an Intrusion Into the Processes of the Federal Court by Attaching a Penalty to a Conviction Based on a Plea of Nolo Contendere, on Which the Federal Court May Act?

The Federal Court in passing judgment on the appellant at the time his criminal income tax case was disposed of found that his license should not be revoked for the particular offense; it also found that the plea of *nolo contendere* did not carry any civil penalties. [Tr. of Rec. p. 6.] The Court could not have used a stronger language in endeavoring to protect appellant's right to practice medicine.

Notwithstanding this action by the Federal Court, The State Board of Medical Examiners suspended the appellant's license to practice medicine because of the convictions based on the pleas of *nolo contendere.*

It is the generally accepted rule that every Court has inherent power to enforce its judgments and decrees.

Florida Guaranteed Securities v. McAllister, 47 F. 2d 762.

The Court may make such orders and issue such process as may be necessary to render the Court's judgments and decrees effective, and this power is not affected by the fact that the decree is final.

Security Trust & Savings Bank v. Southern Pacific, 6 Cal. App. 2d 581, 45 P. 2d 268, 270.

The power to enforce their decrees is necessarily incident to the jurisdiction of Courts.

Commonwealth v. Lewis, 253 Pa. 171.

The Federal Court may stay proceedings in a State tribunal where necessary to protect or effectuate its judgment.

28 U. S. Code, Sec. 2283.

Where the defendant had pursued and exhausted his state remedies, resort to the Federal District Court was appropriate.

United States of America ex. rel. Oliver S. Smith v. J. Vernal Jackson, 234 F. 2d 742 (C. C. A. 2d).

An interlocutory injunction or temporary restraining order is preliminary to a hearing on the merits, the purpose of which is to prevent a threatened wrong or any further perpetration or injury or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition in which they are in at the time,

and thus to protect property rights from further complication or injury until the issues can be determined after a full hearing.

Benson Hotel Corporation v. Woods, 168 F. 2d 694.

The province of a preliminary injunction is to preserve *pendente lite* the last actual peaceable non-contested status preceding a controversy.

Steinberg v. American Bantam Car Company, 76 Fed. Supp. 426;

Automatic Dialing Corporation v. Maritime Quality Hardware Company, 78 Fed. Supp. 558.

A court of equity may, in its discretion, grant an injunction, but a court of equity must exercise its discretion in such a manner as to safeguard the interest of both parties.

Corica v. Ragen, 140 F. 2d 496;

United States v. Cold Metal Process Company, 57 Fed. Supp. 317.

It should be noted that the dismissal of the action in the District Court was based solely on a belief by the trial court that it did not have jurisdiction over the subject matter; and the order dissolving the temporary restraining order was not based on discretion, but strictly on the question of jurisdiction. [Tr. of Rec. pp. 36, 38, 22-23.]

IV.

Is a Conviction of a Felony, Not Involving Moral Turpitude, Based on a Plea of Nolo Contendere, a Ground for Disciplinary Action Against a Physician and Surgeon Under Section 2383 of the California Business and Professions Code?

A conviction of a felony, not involving moral turpitude based on a plea of *nolo contendere,* is not ground for disciplinary action against a physician and surgeon under *Section 2383 of the Business and Professions Code.*

Section 2383 of the Business and Professions Code originally provided in effect that the conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct subjecting a physician and surgeon to disciplinary action.

In 1951, Section 2383 of the Business and Professions Code was amended to provide that a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of the section providing for disciplinary action. At the time this amendment was enacted a comma was placed after the word "felony" in the first portion of the section so that it now reads: "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct."

It is significant, however, that in the amendment providing that a plea of *nolo contendere* shall be deemed to be a conviction, a comma was not placed after the word "felony."

Therefore, assuming for the sake of discussion that the Legislature had in mind that a conviction of a felony not

involving moral turpitude should be a ground for disciplinary action, it is clear the Legislature did not have in mind that a plea of nolo contendere to a felony not involving moral turpitude would come within the class of cases subjecting a physician and surgeon to disciplinary action.

It should be noted that *Section 6101 of the Business and Professions Code provides that a conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension of an attorney at law.*

When Section 6101 of the Business and Professions Code was amended to provide that a plea of *nolo contendere* would be deemed to be a conviction the same as in Section 2383 of the Business and Professions Code, the Legislature did not insert a comma after the word "felony" in the first portion of Section 6101 of the Business and Professions Code to make a conviction of a felony not involving moral turpitude, a ground for disciplinary action.

The Board of Medical Examiners, is faced with two horns of a dilemma: *Either an inadvertent error was made by the Legislature in inserting a comma after the word "felony" in the first portion of Section 2383 of the Business and Professions Code, since it did not see fit to do so in the case of an attorney at law, nor in the portion dealing with a plea of nolo contendere to a felony; or if the Legislature intended to make mere conviction of a felony in the case of a physician and surgeon ground for diciplinary action, then to be consistent we must come to the inescapable conclusion that the Legislature intended that in the case of a plea of nolo contendere it would be*

necessary that the felony involve moral turpitude in order to be deemed a conviction for the purpose of disciplinary action.

The Supreme Court of California has specifically held, relating to lawyers, that a conviction of a felony is insufficient to justify disciplinary action unless there is a showing of moral turpitude.

In re Hallinan, 43 Cal. 2d 243.

The Supreme Court held in the Hallinan case that a nolo contendere plea is not equivalent to a plea of guilty, and that moral turpitude must be inherent in the commission of the offense to warrant disbarment. The Court said on page 247:

> ". . . In view of *Caminetti v. Imperial Mutual L. Ins. Co.,* 59 Cal. App. 2d 476, 490-492 (139 P. 2d 681), holding that a plea of nolo contendere is not the equivalent of a plea of guilty and cannot be used in another proceeding as an admission against the person so pleading, the State Bar was justified in concluding that such a plea was not the equivalent of a 'plea or verdict of guilty' within the meaning of Section 6101 of the Business and Professions Code." (Emphasis ours.)

And again on page 248, the Court said:

> ". . . Moral turpitude must be inherent in the commission of the crime itself to warrant summary disbarment under those sections. As we said in *re Rothrock,* 16 Cal. 2d 449, 454 (106 P. 2d 907; 131 A. L. R. 226), an 'attorney's name will not be stricken from the rolls where the nature of the particular crime does not reflect a bad moral character with respect to the duties of the attorney's

profession.' (See in re *McAllister,* Supra, 14 Cal. 2d 602, 603-604) (8). The language of the statute itself clearly indicates that an attorney can be summarily disbarred only when the crime of which he was convicted involves moral turpitude. Even if it is assumed that statements in the indictment or judgment of conviction describing conduct that goes beyond the essential elements of the crime charged are a part of the 'record of conviction,' as the State Bar contends, the record of conviction is 'conclusive evidence' only when the crime itself necessarily involves moral turpitude." (Emphasis ours.)

An on page 250, the Court said:

"The crucial question in the present proceeding, therefore, is whether or not an intent to defraud the United States is an essential element of the crime proscribed by Section 145, subdivision (b) of the Internal Revenue Code. If an intent to defraud is not an essential element and a person may be convicted thereunder, without proof of that intent or other conduct evidencing moral turpitude, an attorney convicted of that crime cannot be summarily disbarred. (13) Since Section 145, subdivision (b) is a United States statute, we must accept the interpretation given it by the United States courts."

After analyzing the various cases in the United States courts, the Court, in the *Hallinan* case, continued on page 252:

"The foregoing cases establish that fraud is not an essential element of the offense proscribed by Section 145, subdivision (b), that some measure of bad faith or evil intent is an essential element, but such bad faith or evil intent, which can be inferred from evidence that the defendant acted without justi-

fiable excuse, without ground for believing his acts were lawful, or in careless disregard of the lawfulness of his acts does not necessarily involve moral turpitude."

In re Hallinan, 43 Cal. 2d 243.

We urge that it is difficult to understand how the Legislature could have meant one treatment for a lawyer and another for a doctor. It would be discriminatory to say the least.

V.

Was It an Abuse of Discretion to Suspend the Appellant for One Year?

The punishment imposed by the decision of the Board of Medical Examiners, to-wit, suspension from the practice of medicine for one year, was so overly severe and unwarranted by the evidence as to constitute a prejudicial abuse of discretion.

It has been held that where the order or decision of an administrative agency is so severe it must be clearly supported by the findings, and the findings clearly supported by the weight of the evidence, or a prejudicial abuse of discretion has taken place.

Cooper v. State Board of Health (1951), 102 Cal. App. 2d 906;

Sautter v. Contractors State License Board (1954), 124 Cal. App. 2d 149.

We have here the case of a distinguished physician and surgeon who has been practicing medicine for the past twenty years and who maintains an office at 5718 Hollywood Boulevard, Los Angeles, California. A voluminous file was built up by the many letters sent to the Court

and considered by Judge Yankwich. To suspend such a man from practice for one year will destroy his reputation as a medical practitioner in the community, and will deprive his patients of his services during the period of suspension.

In view of all of the circumstances of this case, it clearly appears that this is not the type of case where a physician and surgeon should be deprived of his right to practice medicine, and it would be against the public interest to permit such a harsh penalty to be imposed where no moral turpitude was involved.

Conclusion.

The Federal Court is entitled to protect its finding that the case of Dr. Furnish does not warrant a suspension from the practice of medicine and that the pleas of *nolo contendere* do not carry any civil penalties.

The effort on the part of The Board of Medical Examiners to suspend the appellant from practicing medicine is unwarranted when viewed in the light that the Board is endeavoring to punish the Doctor on the basis of a 1951 amendment being applied to acts committed in 1948 and 1949.

The suspension of a doctor from the practice of medicine is a most serious matter. Therefore, the statute on which the suspension if based should be strictly construed. Even taking the 1951 amendment at its face value, we find that in the case of a plea of *nolo contendere* a showing of moral turpitude is required. The Board agrees that there is no showing of moral turpitude in this case.

Accordingly, it is respectfully submitted that the decision of the District Court should be reversed and the matter proceed to trial on its merits.

Respectfully submitted,

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